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May 3, 2000

Federal Communications Commission
Office of the Secretary
445 Twelfth Street, S.W., Room TW-A325
Washington, D.C. 20554

Re: CellNet Data Systems, Inc. — Petition for Reconsideration
WT Docket No. 97-81

Dear Ms. Salas:

Please find enclosed, on behalf of CellNet Data Systems, Inc., an original and eleven copies of its Petition for Reconsideration in the above-referenced proceeding.

Should you have any questions regarding this submission, please contact the undersigned.

Sincerely,

WILKINSON BARKER KNAUER, LLP



By: Lawrence J. Movshin
Jeffrey S. Cohen

Enclosures

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of)
)
Amendment of the Commission's Rules) WT Docket No. 97-81
Regarding Multiple Address Systems)

To: The Commission

**PETITION FOR RECONSIDERATION OF
CELLNET DATA SYSTEMS, INC.**

CellNet Data Systems, Inc. ("CellNet"), by its attorneys, and pursuant to section 1.429 of the Commission's rules, hereby files its Petition for Reconsideration ("Petition") of the Commission's *Report and Order*, released January 19, 2000, FCC 99-415 ("*Order*"), in the above-captioned proceeding.¹

As a threshold matter, CellNet applauds the Commission for the actions taken in the *Order*. Overall, the *Order* creates an appropriate licensing scheme for Multiple Address Systems ("MAS"), particularly with regard to the heavily encumbered 928/952 MHz band. However, CellNet requests the Commission to reconsider two aspects of the *Order*, involving the offering of private carrier services and the grandfathering of incumbents, which, in CellNet's view, will unduly burden licensees who have developed systems and created substantial value in the use of these frequencies. Specifically, CellNet urges the Commission to modify new rule section 101.135(e) to permit the offering of private carriage services using excess capacity spectrum. Additionally, the Commission should reconsider its grandfathering rules with respect to transfers and assignments to ensure that

¹ The Commission also released an *Erratum* to the *Order* on March 3, 2000, DA 00-307.

the transfer of licenses, and the systems associated with them, does not alter the availability of such networks for continued use, regardless of the eligibility of the transferee or assignee to apply for new 928/952 MHz licenses.

I. The Commission Should Permit the Use of Excess Spectrum Capacity for the Offering of Private Carrier Services.

In the *Order*, the Commission appropriately decided to continue licensing the 928/952 MHz band on a site-by-site basis with prior frequency coordination.² However, only “private internal radio services” may be provided in this band.³ The term “private internal radio service” is defined as “a service where entities utilize frequencies purely for internal business purposes or public safety communications and not on a for-hire or for-profit basis.”⁴ The definition of private internal radio service, by use of the word “purely,” could be read to suggest that a licensee must use all of its licensed bandwidth for the provision of private internal radio services.

Furthermore, in the *Erratum*, and without any specific explanation, the Commission modified § 101.135 to add a new subsection (e), which prohibits applicants licensed in the 928/952 MHz band 60 days after publication of the *Order* in the Federal Register from providing services to others on a for-profit private carrier basis, regardless of whether the services are “public safety radio services,”

² *Order* at ¶¶20, 45.

³ *Id.* at ¶¶20, 22. *See also* amended section 101.147, Note 28, which states “subsequent to July 1, 1999, MAS operations, as defined in § 101.1331(a), in the 928/952/956 MHz bands are reserved for private internal use.”

⁴ *See* new rule section 101.1305, as amended by the *Erratum* at 7.

i.e., exempt from competitive bidding.⁵ CellNet asks that the Commission reconsider this new limitation, which does not appear to be the product of reasoned decision-making.

Specifically, the FCC is required to address and discuss comments from the public when adopting significant rule changes.⁶ Although CellNet raised the issue of private carriage in its comments on this proceeding, neither the *Order* nor the *Erratum* addressed the issue of private carriage at all; there is simply no explanation for this prohibition.⁷

In its comments, CellNet urged the Commission to adopt an express provision that would allow the leasing or sale of excess capacity on a private internal network, even on a for-profit basis, provided that the licensee uses a majority of the spectrum for auction-exempt purposes.⁸ As CellNet explained, the ability to lease excess capacity would encourage MAS licensees to utilize scarce spectrum as efficiently as possible. Absent an option to lease excess capacity, an MAS licensee not using the full extent of its licensed spectrum is forced to leave any excess capacity unutilized. Moreover, Congress could not have intended that excess capacity remain unused as a result of the

⁵ *Erratum* at 5-6. Section 101.135(e) appears to be an absolute bar even to the offering of excess capacity on a private carrier basis where most of the spectrum is used for private internal or auction-exempt purposes. It is also unclear whether this new prohibition would apply in any way to licensees who are entitled to incumbency status in the 928/952 MHz band.

⁶ *See Home Box Office, Inc. v. FCC*, 567 F.2d 9, 35-36 (D.C. Cir. 1977) (“The opportunity to comment is meaningless unless the agency responds to significant points raised by the public.”)

⁷ Indeed, the only discussion even modestly related to the private carriage issue can be found in paragraph 22 of the *Order*, where the Commission stated that it would not permit licensees in this band to provide services to others on a non-profit, cost-shared basis. *Order* at ¶22. And this “license” sharing is a far cry from the concepts advanced by CellNet, which would allow for limited private carriage of “excess” capacity by an otherwise fully qualified, and clearly eligible licensee.

⁸ *See Comments of CellNet Data Systems, Inc. in WT Docket No. 97-81*, filed September 17, 1999, at 22.

changes it enacted to the Commission's auction authority. In fact, leasing excess capacity permits licensees to help defray the costs of providing the private internal radio services which Congress intended to foster.

Allowing private carriage on an excess capacity basis would also be consistent with the operational flexibility provided under the new MAS rules. MAS licensees are now permitted to provide point-to-point, point-to-multipoint, and fixed and mobile services, which will permit licensees to provide a greater variety of services.⁹ In order for licensees to take full advantage of these new operational opportunities, they should not be forced to leave excess capacity unused simply because they have maximized their own private internal communications needs. CellNet therefore urges the Commission to reconsider this bar, and amend the newly adopted provisions of § 101.135(e) accordingly.

II. The Commission Should Extend Grandfathering Protections in the 928/952 MHz Band to All Licenses That Are the Subject of Transfers of Control or Assignments If the Original Use of the License Will Remain Unchanged.

The Commission's new rules define an incumbent station as "any station licensed by the Commission prior to July 1, 1999, as well as any assignments or transfers of such station as of January 19, 2000."¹⁰ Operators of incumbent stations in the 928/952 MHz band may continue existing operations under their current authorizations, regardless of eligibility restrictions that may preclude the licensees from applying for additional MAS licenses.¹¹ Incumbents can also expand

⁹ *Order* at ¶103.

¹⁰ *See* new rule section 101.1331(a).

¹¹ *Order* at ¶¶56, 57. CellNet also requests that the Commission clarify that licensees retain incumbency status following duly filed and approved renewal applications.

their systems subject to existing rules on interference protection and co-channel spacing.¹² CellNet believes it fully enjoys incumbency status (and that it also continues to be eligible to apply for new stations under the rules of eligibility adopted in the *Order*).

The Commission decided to provide grandfathered status in order to preserve current operations and minimize the amount of disruption to existing operations.¹³ The Commission was also concerned about MAS operators who may not have the resources to relocate their operations to other spectrum. This inability, in the Commission's words, "would compromise the important functions they provide."¹⁴ The FCC's rules, however, effectively would bar the sale of a grandfathered business that relies on MAS licensed facilities with incumbency status. No public policy rationale has been offered to support this limitation on the transferability of ongoing business operations, particularly if the new owner's use of the assigned or transferred stations remains generally unchanged from those of the transferring licensee. The Commission should permit a new license owner intending to continue an existing enterprise supported by MAS networks to inherit the same grandfathering rights as the previous owner — the right to continue and expand existing operations in this frequency band. Permitting grandfathering in such circumstances would preserve and minimize disruptions to existing business operations, notwithstanding the transfer of the licenses; denying grandfathered status to such operations has no apparent public interest benefit.

¹² *Id.* at ¶58.

¹³ *Id.* at ¶56.

¹⁴ *Id.*

Assignments and transfers of control are often beneficial to the going concern of a business, whether due to economies of scale or the need for access to new capital. Indeed, as the Commission is well aware, it is commonplace in the wireless industry for companies to engage in mergers, consolidations, acquisitions, *etc.* In the absence of grandfathered status, a prospective assignee or transferee of a business utilizing MAS networks, who would be ineligible for new 928/952 MHz licenses, could be forced to relocate the MAS system to other frequency bands, or at the very least, would be forced to expand the business uses of MAS spectrum into new, incompatible bands. Either case may be prohibitively costly and disruptive to the company, and clearly not in the public interest. Thus, the Commission must ensure that its grandfathering policies do not hinder the opportunities generated by ongoing and future transactions in the wireless field.

Ironically, providing incumbency status for assignees and transferees would be consistent with the Commission's prior decisions with regard to the application freezes it imposed on MAS operations. For example, although the *Further Notice of Proposed Rule Making* in this proceeding expanded the pre-existing MAS application suspension in part "to permit the orderly and effective resolution of the issues in this proceeding,"¹⁵ the Commission did not apply the freeze to license assignments or transfers of control.¹⁶ Certainly, now that final rules are adopted, there is no reason for the Commission to essentially "freeze" any transfers or assignments to companies ineligible for new 928/952 MHz MAS spectrum that want to maintain the existing business by requiring the surrendering of grandfathered status.

¹⁵ *Amendment of the Commission's Rules Regarding Multiple Address Systems*, WT Docket No. 97-81, *Further Notice of Proposed Rule Making and Order*, 14 FCC Rcd 10744, 10761 (1999).


¹⁶ *Id.*

III. Conclusion

For the foregoing reasons, the Commission should reconsider the actions taken in the *Order* and (i) remove any prohibitions on the offering of excess capacity, even for profit, on the 928/952 MHz channels and (ii) extend grandfathering status to incumbent licenses, even after a license-holder is the object of an acquisition, merger, consolidation, or other assignment or transfer of control, consistent with the views expressed herein.

Respectfully submitted,

CELLNET DATA SYSTEMS, INC.



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May 3, 2000